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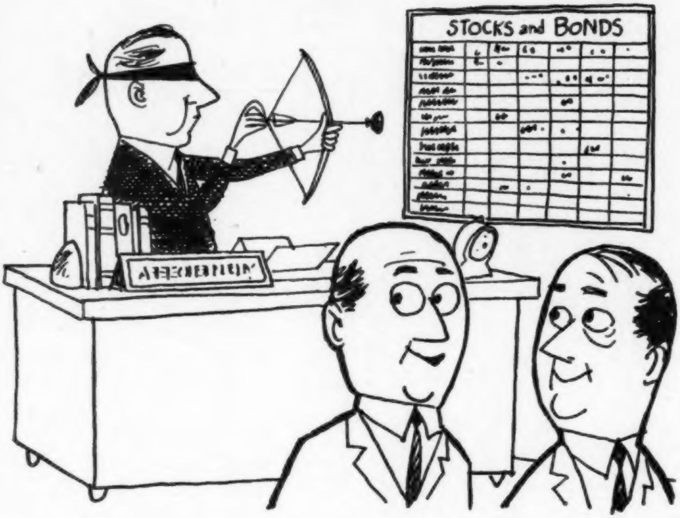

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The Los Angeles
BAR BULLETIN

VOLUME 35 • NUMBER 3 • JANUARY 19

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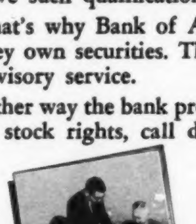

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THE PRESIDENT'S PAGE

☆ ☆ ☆ ☆ ☆ HUGH W. DARLING

The Deranging Trend of Administrative Agencies

» » THE CURRENT TUSSLE between the Judiciary and the Department of Motor Vehicles places in the public spotlight the increasing trend of administrative agencies towards a boot strap merger of the three independent branches of our government.

In 1887 the Interstate Commerce Commission was set up by an Act of Congress. The idea was to establish a quasi-judicial agency comprised of experts in the field of transportation. The idea worked and then it spread, perhaps too fast and certainly too far.

Today in the Federal government alone we have more than 100 quasi-judicial agencies. These tribunals in the aggregate have some 340 trial examiners, topping Federal District Judges by about 100, hearing cases with a backlog in the area of 14,000.

In his dissenting opinion in Federal Trade Commission v. Ruberoid Co., 343 U. S. 470 (1952), Justice Jackson employed some meaningful and provocative language:

> "They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive, or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

One ground of complaint leveled at administrative agencies is that they insist upon arrogating the legislative function, mainly through the medium of rule-making notwithstanding the salutary restriction that only such rules may be adopted "as are reasonable or necessary to carry out the pur-

poses and provisions" of the law creating the agency. Another method of encroaching is to lace the certificate or permit with conditions, some even requiring a concession of jurisdiction, which the melancholy applicant has the dubious privilege of either accepting or going to court—usually little better than Hobson's choice.

The other principal ground of complaint is that too many agencies act as prosecutor, judge and jury, in most instances unhampered by any real threat of challenge in the courts. Chairman John B. Gage of the Administrative Law Section of the American Bar Association succinctly stated the problem in these words:

> "There are still many of the over 100 federal regulatory agencies which have not emerged from the darkness and arbitrariness of a closed-mind bureaucratic attitude."

It may be noted that in 1958, although the Los Angeles office of the Division of Corporations processed more than 10,000 applications for permits, only three cases were filed in the Los Angeles Superior Court for review of the Commissioner of Corporations' ruling. These figures can be used in argument that the Commissioner is doing a commendable job. But it is equally valid to say they connote that the cost in time and money of seeking judicial relief from an unwanted ruling of an administrative agency is such that the hapless petitioner, however sound his position may be, seldom can do otherwise than acquiesce.

Unless sturdier judicial and legislative ramparts are raised against the corrosive thrust of administrative agencies, our three-branch system will become more than deranged. If nothing more, court reviews must be made fully and fairly accessible from the standpoint of both time and cost.

As lawyers we have a duty to intervene in matters pertaining to the preservation of our constitutional system where the need for intervention exists. The efforts of the Bar, particularly the Administrative Law Section of the A. B. A., in this field have been fruitful. The continued growth of administrative power and authority, however, suggests that much remains to be done.

With this issue the Los Angeles Bar Bulletin is modestly enlarged and assumes a new format. The additional pages and double columning combine to give us more usable space.

We trust you will find it more readable and perhaps more attractive in its new dress. In any event here it is with our very best wishes for the New Year.

THE BULLETIN COMMITTEE

By GEORGE M. TREISTER

Member of
Quittner, Stutman & Treister
Los Angeles

The Right to INTEREST IN BANKRUPTCY

» » THOSE WHO PARTICIPATE in commercial transactions usually contemplate that interest will be paid for the use of money. Frequently, the right to interest at a specified rate is covered by the express language of the contract. In other cases, it is implied from the custom of the trade or from a prior course of dealings between the parties.[1] Sometimes the law itself provides for the payment of interest by a debtor unless he has agreed otherwise with the creditor.[2] Moreover, where there is a right to interest at all, it continues to accrue until the debt is paid or a proper tender of payment has been made.[3]

The bankruptcy of the debtor, however, has an impact upon the normal commercial rules of interest just as it does upon so many other phases of the debtor-creditor relationship. The individual creditor, knowing that in most bankruptcies he can expect a pitifully small dividend on the principal of his claim, probably pays little attention to what happens to the interest factor. But this does not mean that the interest question in bankruptcy is unimportant. In terms of the total amount of money at stake each year, the bankruptcy rules which prescribe an allowance of interest on some claims and a disallowance of interest on others have a decided economic significance. Of more immediate concern to the unsecured creditor is the fact that the allowance of interest on certain debts reduces *pro tanto* the share of the estate available for dividends to creditors not so favored—a matter of particular moment in the case of secured and priority obligations which must be paid in full before general creditors receive anything.

The following discussion of the right to interest in bankruptcy will first consider the applicable general principles, and will then deal with certain special types of claims which are accorded a different treatment.

---

[1] E.g. *Auzerais v. Naglee,* 74 Cal. 60, 70-72 (1887).

[2] For example, Section 1914 of the California Civil Code provides: "Whenever a loan of money is made, it is presumed to be made upon interest, unless it is otherwise expressly stipulated at the time in writing." The legal rate of interest in California is 7% per annum, Const. Art. XX, Sec. 22, although the parties may contract for a different rate within the limits of the usury laws.

[3] "An offer of payment or other performance, duly made, . . . stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." Civil Code, Sec. 1504.

General Principles

Consideration of the right of any given claim to interest in bankruptcy should begin with an inquiry as to the "provability" of the debt. For unless the claim is provable, it cannot be "allowed," and hence cannot participate in the distribution of the bankrupt estate, even for its principal amount.[4] Section 63 of the Bankruptcy Act enumerates the types of debts which are provable. Generally speaking, the section in its present form encompasses judgments of all kinds,[5] and the bankrupt's contractual or quasi-contractual obligations, whether the contract be express or implied, and whether the debt is fixed or contingent, matured or not due. On the other hand, non-judgment tort claims against the bankrupt are not provable with one exception, namely, the case of a claim for damages arising out of the bankrupt's negligence, if the action has been instituted and is pending on the date of bankruptcy.

The right of a provable claim to interest in bankruptcy, the interest rate and the date from which it begins to run, depend first on the claimant's interest rights under applicable non-bankruptcy law — usually state law.[6] The Bankruptcy Act, with perhaps minor exceptions, does not itself create the claims of creditors, although it does operate frequently to cut down rights recognized by the states. As noted above, the contracting parties or the general commercial rules normally provide for the payment of interest, at least after the maturity of the debt.[7]

Assuming that the obligation is an interest bearing one outside of bankruptcy, questions then arise as to the effect had by the filing of the petition upon interest accrued prior to bankruptcy and that accruing thereafter. Oddly enough, the reported cases and the commentators have paid little attention to the former of these problems, although much has been written concerning the latter.

The only pertinent reference to interest in the Bankruptcy Act is

[4]The distinction between the bankruptcy concepts of "provability" and "allowability" should be kept in mind. Section 63 of the Bankruptcy Act lists the "provable" debts, i.e., those which can qualify to participate in the distribution of the estate. But before such a claim may be "allowed," a procedure regulated by Section 57 of the Act, it must be proved or filed in the prescribed form and manner. Sections 57a, b, n; General Order 21. There are some additional conditions which must be met, for example: unliquidated or contingent provable claims are non-allowable unless they are capable of liquidation or of reasonable estimation promptly enough so as not to unduly delay the bankruptcy administration, Section 57d; provable claims held by creditors who have received preferences or fraudulent or other voidable transfers will not be allowed until such transfers are surrendered to the trustee, Section 57g.

Thus, not all provable claims are allowable. See Section 57 of the Bankruptcy Act. A discharge in bankruptcy, however, operates as a release of the debtor's provable obligations, whether or not they are allowable. Bankruptcy Act, Section 17; cf. Section 63d. In this connection, an interesting question arises as to whether interest accruing after bankruptcy is dischargeable. That it is seems clear, regardless of its provability, at least when the interest involved has accrued on an ordinary, dischargeable debt. The theory is that the interest factor cannot survive the discharge of the principal to which it is merely incident. Cf. 3 Collier on Bankruptcy, pp. 1839-1840. But the problem is more difficult in the case of post-bankruptcy interest on tax claims. Such interest is non-allowable in bankruptcy, see text *infra*, but tax claims themselves are non-dischargeable, Section 17a(1). The leading case on the point, *Sword Line v. Industrial Commissioner of State of N. Y.*, 212 F. 2d 865 (C.A. 2, 1954), *cert. den.* 348 U.S. 830, a chapter XI proceeding, apparently establishes that post-bankruptcy interest on tax claims is dischargeable.

[5]There is some doubt as to whether a claim for alimony is provable under Section 63, even if it has been reduced to judgment before bankruptcy. See 3 Collier on Bankruptcy, p. 1816, and cases there cited.

[6]Of course, the Government's right to interest often is created and regulated by some non-bankruptcy, federal statute.

The usury principles which are applicable in bankruptcy generally derive from state law. In objecting to claims filed in the proceeding, the trustee can assert whatever usury defenses would have been available to the debtor outside of bankruptcy, Section 70c. Additionally, the trustee can take advantage of and prosecute any affirmative causes of action for usury which the bankrupt possessed, Section 70a(6). See also 3 Collier on Bankruptcy, pp. 1807-1809.

[7]State law generally enforces any contract made by the parties as to the date from which interest accrues. See 28 Cal. Jur. 2d 399. Absent such an agreement, Civil Code Section 3287 provides for interest to run from the debt's due date: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. . . ."

found in Section 63a(1) which defines the first category of provable debt to be an absolutely owing "fixed liability, as evidenced by a judgment or an instrument in writing," whether or not it is due and payable as of bankruptcy, together with any interest which has accrued up to that date.[8] There is no comparable mention of interest, however, in connection with other groups of provable claims such as open accounts, oral contract debts, contingent contractual debts, those arising by virtue of quasi-contract principles, and workmen's compensation awards. From this omission, it could be argued that even pre-bankruptcy interest is not allowable on a claim unless it fits within the first category of provability. Such seems to be the common understanding of the law, at least in the Southern District of California, since creditors rarely assert claims for interest on their bills unless they hold judgments, notes or other written documents expressly calling for it.

On the other hand, more can be said in favor of the right of a creditor holding any kind of provable debt to assert a claim for interest owing to him under state law which has accrued prior to bankruptcy. Thus, General Order in Bankruptcy 21(1), dealing with the manner of proving claims, *inter alia* provides: "A proof of claim for a debt founded upon an open account shall state when the debt became or will become due; . . . in default of which no interest shall be allowed." The General Orders, promulgated by the Supreme Court pursuant to Section 30 of the Bankruptcy Act, have governing force if not inconsistent with the Act itself. It would seem implicit in the foregoing provision that interest is allowable on open account claims—which are provable by virtue of Section 63a (4) rather than under the first category—so long as the claimant observes the prescribed formalities. If this be true, it takes only a slight extension to make the same interest rule applicable to all categories of provable debts.[9] Support for this position is found in the cases recognizing the allowability of pre-bankruptcy interest on tax claims[10] which are provable in bankruptcy, not by virtue of Section 63a(1), but under other portions of the Act.[11]

There is no similar uncertainty in the law respecting interest accruing after the bankruptcy petition has been filed. While the various American bankruptcy statutes, including the present one, have been silent on the point, the courts in this country long ago elected to adopt the English rule cutting off post-petition interest.[12] This view has much to recommend it, both from the standpoint of general equity and from that of the practical necessities of bankruptcy administration.

The liquidation and distribution of an insolvent estate is a time consum-

[8]Section 63a(1) also provides in effect that if this type of debt is non-interest bearing, and has not matured as of the time of bankruptcy, the claim shall be reduced by "a rebate of interest" for the period from the filing of the petition to the date of maturity. Similarly, Section 63a(5), the only other subdivision which mentions interest, refers to provable claims reduced to judgment after bankruptcy, and makes non-provable any post-bankruptcy interest included in the judgment.

[9]The reasons relied upon for denying post-bankruptcy interest, see text *infra*, are not applicable to that earned before bankruptcy.

[10]Earlier in the history of American bankruptcy, the debtor's delinquent taxes were held to be entitled to interest until their actual payment by the trustee, but now they have been assimilated to ordinary unsecured debts for interest purposes, see text, *infra*. However, it seems clear that interest accrued up to the filing of the petition is allowable on tax claims. See e.g., *New York v. Saper*, 336 U.S. 328 (1949).

[11]There is no doubt that tax claims are provable in bankruptcy, but the courts have not always agreed on the rationale for this conclusion. Compare *United States v. Bernstein*, 16 F.2d 233 (C.A. 8, 1926) with *Ingels v. Boteler*, 100 F.2d 915, 918 (C.A. 9, 1938), *aff'd* 308 U.S. 57.

[12]The Supreme Court stated this principle in *Sexton v. Dreyfus*, 219 U.S. 339 (1911). Typical of the older English decisions are *Bromley v. Goodere*, 1 Atk. 75 (1743); and *Ex parte Bennet*, 2 Atk. 527 (1743).

ing affair. In cases of any complexity, a year or perhaps a considerably longer period will elapse before the matter can be concluded.[13] If all the bankrupt's debts bore interest at the same rate, the net dividend to each creditor would be the same whether or not post-bankruptcy interest was allowable, leaving aside for the moment the fact that some claims are accorded priority treatment. But the interest rate is determined by reference to non-bankruptcy law and varies from claim to claim. The delay in liquidation compelled by the law itself should not be permitted to prejudice those creditors whose obligations draw interest at a low rate or not at all.[14] Allowance of post-bankruptcy interest to priority claims, moreover, would occasion an even greater inequity, since these are payable in full before anything is distributed to general creditors.

Considerations of administrative convenience also lead to the rule against post-petition interest. Unless some cut-off date is adopted, a trustee in bankruptcy would be required to calculate accruing interest on every participating claim in order to pay a dividend. In cases involving more than a single distribution, recomputations of burdensome proportions could be expected.[15] By adopting the time of bankruptcy as the terminal point for interest – the same date of cleavage employed by the Act in fixing many other rights and duties–the decisions have eliminated these burdens which are expensive to the estate. The duty to make the initial and only interest calculation is properly shifted to the creditors themselves.

The rule is one of *insolvency* practice, however, and the reasons which sustain it lose most of their force in the unusual case of a solvent bankrupt.[16] Accordingly, the American courts have recognized an English exception as well as the English general rule, namely, that where the estate is or becomes sufficient to pay all creditors in full, they will be allowed interest on their claims to the date of payment before the surplus may revert to the debtor.[17]

Secured Claims

The general principle prohibiting the allowance of post-bankruptcy interest is frequently stated as having applicability to secured as well as unsecured debts, with certain exceptions recognized in the case of the former.[18]

(Continued on page 89)

[13]Section 57n of the Bankruptcy Act allows proofs of claim to be filed for a period of six months after the first meeting of creditors, which usually is called in voluntary bankruptcy cases approximately three weeks to one month following the filing of the petition. See Section 55a. Accordingly, whenever the bankrupt has more than nominal assets, it will take a minimum of approximately seven months to close the estate. In involuntary bankruptcies, where the debtor contests the petition, it is quite possible for lengthy litigation to occur before entry of the order of adjudication, see Bankruptcy Act, Sections 18d, 19; and the first meeting of creditors cannot be scheduled until after adjudication, Section 55a.

Sometimes the nature of the assets makes their liquidation by the trustee a matter of considerable difficulty and thus causes additional delay. Most often, the delay results from litigation over the validity or allowability of certain claims which have been filed, or from plenary suits brought by the trustee in forums other than the Bankruptcy Court to recover voidable transfers under Sections 60, 67d, 70c or 70e of the Act.

[14]See, for example, *United States v. Edens*, 189 F. 2d 876, 877-878 (C.A. 4, 1951), *aff'd* 342 U.S. 912.

[15]3 Collier on Bankruptcy, p. 1836. See *Vanston Committee v. Green*, 329 U.S. 156, 164 (1946).

[16]Probably it is more technically accurate to term the case of a solvent bankrupt one where the general rule has no applicability, rather than considering it an exception to the rule.

[17]Most references to this principle are by way of dicta, as is to be expected since a solvent bankrupt is such a rarity. See, e.g., *New York v. Saper*, 336 U.S. 328, 330, n.7 (1949); *Vanston Committee v. Green*, 329 U.S. 156, 164 (1946). *Marcalus Manufacturing Co. v. United States*, 169 F. Supp. 821 (Ct. Cls., 1959), is a square holding that post-bankruptcy interest is allowable in the solvency situation. For the English cases on which this American rule is based, see *Bromley v. Goodere*, 1 Atk. 75 (1743); *Ex parte Mills*, 2 Ves. Jun. 295 (1793); *Ex parte Clarke*, 4 Ves. Jun. 677 (1799).

[18]The following is a typical manner of stating the rule: "This general principle [that interest stops at bankruptcy] is, with one exception presently to be discussed, applicable to secured as well as to unsecured claims." 3 Collier on Bankruptcy, p. 1837.

The Attorney General's New Ruling on Agreements for Stock Redemptions or Purchases at Death

By LEON B. BROWN
Member of the Los Angeles firm of Armstrong & Brown

» » AS THE RESULT of a fine spirit of cooperation with the bar on the part of the Commissioner of Corporations and the Attorney General, an opinion has just been rendered which is of great importance to every lawyer engaged in estate planning.

For many years shareholders of close corporations have entered into agreements for the purchase of their shares upon death, either by the corporation itself (in which case the purchase is called a redemption[1]) or by fellow-shareholders. Sometimes the purchase is made mandatory, sometimes optional. To make sure that the shares will be available, the agreement ordinarily provides that they shall not be sold during the owner's lifetime without first being offered to the corporation or the other shareholders, at the contract price, and that a reference to this restriction shall be endorsed on the share certificates to give notice to any prospective purchaser.

Very frequently it is the stockholder whose shares are restricted during lifetime who insists that the restriction be spelled out, for the Commissioner of Internal Revenue and the Tax Court have ruled that in the absence of such an express restriction, the price stipulated in the contract, at which the decedent's shares may or must be purchased or redeemed, will not be accepted as fixing the value of the shares for estate tax purposes.[2]

The Corporate Securities Law, which prohibits selling a security without first obtaining a permit, defines "sale" as including "any change in the rights, preferences, privileges, or *restrictions* on outstanding securities."[3] The theory is that such a change creates a new security, which must be exchanged for the old and therefore requires an "exchange permit." Back in 1948 the Attorney General ruled[4] that a corporation required a permit to amend its by-laws so as to restrict the transfer of its shares. This ruling led to the practice of placing such restrictions in the agreement itself, rather than in the by-laws. This seemed proper, for the Supreme Court, in *Vanucci v. Pedrini*, 217 Cal. 138, 17 P. 2d 706 (1932), had held that even if a by-law restriction on transfer is ineffective as "corporate legislation," which necessarily affects all stockholders, it may nevertheless be enforceable as a contract against shareholders assenting thereto. Last year, however, this practice got a rude jolt when it was reported to members of the local bar[5] that the Commission-

[1] Internal Revenue Code Sec. 317.
[2] Rev. Rul. 54-77, CB 1954-1, 193; Estate of James M. Matthews, 3 TC 525 (1944).
[3] Corporations Code, Sec. 25009(a).
[4] Op. 48-6, 11 Ops. Atty. Gen. 89.
[5] Maynard J. Toll, "Effect of California Law on Stock Redemption Agreements," Proceedings of Title Insurance & Trust Co. Forum, May, 1958, pp. 67-8.

er of Corporations was of the opinion that a permit should be obtained in every case in which a corporation is a party to a contract imposing restrictions on transfer of its shares.

In the course of preparing a paper on stock redemptions[6] it was brought to the writer's attention that some members of the Commissioner's staff took an even more extreme view, claiming jurisdiction over *all* redemption agreements, whether the restriction on transfer was express or merely implied, and also over every restrictive agreement between stockholders where a reference thereto was endorsed on the share certificate. To ascertain whether this position was supported by the Attorney General's office, the writer sought an appointment with T. A. Westphal, Jr., Chief Assistant Attorney General. Graham L. Sterling, Jr., who was then President of the State Bar, lent his assistance in arranging the meeting, which was held in San Francisco on October 6, 1958 and was also attended by Donald A. Pearce, Assistant Commissioner of Corporations, and Victor Griffith, Deputy Attorney General. At this meeting, after much discussion, it was decided that the writer should prepare several hypothetical questions as to restrictive agreements, on the basis of which the Commissioner of Corporations would formally request a ruling as to his jurisdiction, and that if the Attorney General's opinion should be in favor of the jurisdiction claimed the question might be tested by a declaratory relief suit.

This plan was carried out, and, after submission of authorities and argument, the ruling has now been published as Opinion No. 58-208, dated October 30, 1959. The first hypothetical question presents a typical mandatory redemption agreement, with an express restriction on lifetime transfer of shares. The second question is the same except that the purchase is to be made by the other shareholders, rather than the corporation. The third question is whether the answer to either of the first two questions would be different if the contract required notice of the restriction to be endorsed on the share certificates. The ruling of the Attorney General is that no permit is required from the Commissioner of Corporations for either of the contracts described, even if the certificates are so endorsed. Citing the *Vanucci* case as to restrictions arising only by contract, rather than through "corporate legislation, i.e., bylaws," the opinion declares that "the essence of the transaction is a contract of sale, not a change in the rights or restrictions on some of the outstanding shares." The opinion concludes that "annual adjustment of the purchase price is in the same category as the original agreement and does not fall within the regulatory features of the Corporate Securities Act."

So ends a real threat to traditional agreements for the redemption or purchase of stock upon death and to the conclusiveness of such agreements in fixing estate tax values. Through the commendable cooperation of the Commissioner and Attorney General, avoiding the usual years of uncertainty and litigation, it is now determined, for all practical purposes, that restrictions on transfer during lifetime, despite a reference thereto on the share certificates, will not require a permit so long as the restrictions are purely contractual.

[6] 1959 So. Calif. Tax Inst. 171, 215-224.

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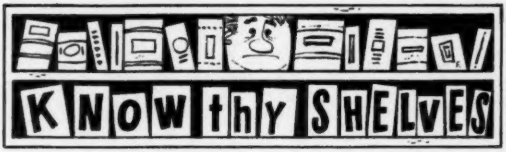

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

AIRCRAFT: *Procedures in the Financing of Small Aircraft* by E. M. Barto Jr. (University of Virginia School of Consumer Banking, Inc., 121 p.) is a commercial study of the history and legal aspects of civil aircraft financing. There is a bibliography and collection of Civil Aeronautics administration forms and other forms used in such transactions.

ESTATE AND GIFT TAXATION: Two works have appeared this month, one simple, and one exhaustive. Jacob Mertens, with the assistance of A. E. Moscowitz, is the author of *The Law of Federal Gift and Estate Taxation* (New York, Lofit). The first four volumes cover estate tax. The remaining two will cover gift tax, tables and indices. An important chapter in the first volume covers "Actuarial Determination of Value" which contains many tables and examples of working formulae. The Tax Club is responsible for *The Federal Estate and Gift Taxes* by Stephens and Marr (New York, 426 p.). It is a simple one volume treatment useful for those who only occasionally deal with estate and gift taxes.

ESTATE PLANNING: Snee and Cusack are authors of *Principles and Practice of Estate Planning* (Englewood Cliffs, Prentice Hall, 390 p.), another in a popularly written series of legal how-to-do-it books. There is little documentation, but there is a bibliography and index. A few forms are included.

JURISPRUDENCE: *The Complexity of Legal and Ethical Experience: Studies in the Method of Normative Subjects* (Boston, Little Brown, 331 p.) is a collection of law review articles by F.S.C. Northrop, Professor of Philosophy and Law of Yale Law School. He discusses philosophical problems and current trends in natural law ethical theory. Several chapters are new.

MEDICINE: *The Law of Medical Practice* by Professors Burke Shartel and Marcus Plant of the University of Michigan (Springfield, Ill., Thomas, 445 p.) grew out of a course given to medical students. The book is designed as well for lawyers who advise physicians in connection with their practice. Sections cover professional services, compensation, malpractice and tort liability, licensing, business transactions, and the physicians public duty as witness and in giving medical opinions.

STATE CONSTITUTIONS: *Index Digest of State Constitutions,* 2d ed. (Columbia University, 1132 p.) is useful in doing comparative research in state constitutions. It is arranged alphabetically by topic with a digest and citations.

TAXATION: The Tax Institute has published its 1958 symposium on *Depreciation and Taxes* (Princeton, 248

p.). The talks are undocumented and cover the fundamentals of depreciation, changing price level, specific aspects of depreciation as well as its treatment in other countries.

TITLES: Julius L. Sackman, attorney in the Department of Law, New York, is author of *The Law of Titles* (Albany, Matthew Bender, 1155 p.). The work is divided into several sections: Sources of title, parties to deeds, other elements of deeds, judicial and statutory sales and adjudication of title. The chapter on transfer by operations of law contains charts and statutory references on descent arranged by state.

TRADEMARKS: *Trademark Law and Procedure* by E. C. Vandenburgh III of the Illinois Bar is the latest work in the field (Indianapolis, Bobbs-Merrill, 640 p.). The appendix reprints the Trademark Act of 1946 and related portions of other statutes. A model state trademark bill and forms are also included.

TRIALS: *Shout Treason: The Trial of Aaron Burr* by Francis F. Beirne (New York, Hastings House, 298 p.) is a popular account of the famous trial at Richmond in 1807 with John Marshall presiding. There is a bibliography and index.

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Deduction of Losses from Demolition of Real Property Improvements

By HOWARD C. ALPHSON
Of the Los Angeles firm of Gordon, Knapp, Gill & Hibbert.

» » A MORE AND MORE FREQUENT sight in the Los Angeles Metropolitan Area in recent years has been that of voluntary demolition of older commercial and rental real property improvements followed by erection of a new building.

The tax consequences of the voluntary creation of a loss in such circumstances and others similar in nature, are the subject of recently proposed regulations under Section 165 of the Internal Revenue Code of 1954.[1] The Code section provides, with certain qualifications, for the deduction of losses sustained during a taxable year which are not compensated for by insurance or otherwise.

Under the proposed regulations, allowance of a tax deduction for loss arising from demolition of real property improvements in the course of a trade or business or in a transaction entered into for profit would depend upon the intention of the taxpayer.

If the taxpayer acquired the property with the intention of demolishing the improvements, the proposed regulations provide that no loss deduction is allowed and the entire cost of the property is, with one exception, allocated to land only with no immediate tax benefit. If the intention to demolish existed at the time of acquisition but the time of demolition is deferred to a subsequent date, then an amount of the purchase price equal to the present value of the right to receive rentals from the improvements to be demolished may be allocated to them and depreciated over the period of intended use. In the event the period of use is terminated prior to the intended termination, then the taxpayer may write off the remaining tax basis in the improvement as a loss in the year of demolition.

If, on the other hand, the taxpayer acquired the property with no intention of demolishing the improvements but subsequently formed such an intention and removed the improvements, then a loss deduction would be allowed in the year of demolition for an amount equal to the remaining tax basis of the demolished improvements.

The foregoing rules are, however, qualified in the situation where the demolition occurs pursuant to the terms of a lease to make way for a new building. In that event, no loss is allowable and the taxpayer is required to treat the remaining tax basis of the demolished improvement as a part of the cost of the lease to be amortized over the term of it.

The proposed regulations incorporate the basic test of intention which exists in the present regulations[2] but in addition furnish a list of circum-

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[1]Section 1.165-3 of the proposed regulations was published in the Federal Register of October 8, 1959.

[2]Reg. 118, Section 39.23 (2)-2.

stances which would be considered to evidence the taxpayer's intention concerning demolition at the date of acquisition.

Circumstances which would be considered to evidence an intent to demolish at the date of acquisition include:

1. Short delay between time of acquisition and demolition.
2. Prohibitive remodeling costs.
3. Municipal regulation preventing continued use for profit purposes.
4. Unsuitability to taxpayer's trade or business.
5. Inability to realize a reasonable income.

The existence of certain other facts would be deemed indicative of formation of the intent to demolish the building at a date subsequent to acquisition. Such facts include:

1. Immediate substantial improvements to the property.
2. Prolonged use.
3. Suitability for investment purposes.
4. Substantial change in economic or business conditions.
5. Loss of useful value.
6. Substantial damage.
7. Discovery of latent structural defects.
8. Decline in taxpayer's business.
9. Condemnation.
10. Inability to obtain building materials for improvement.

It should be noted that certain courts, as well as the Tax Court, have taken a position contrary to the proposed regulations in the situation where the intent to demolish arises after the date of acquisition.[3] If, in that situation, the demolition occurs to make way for a new structure these decisions have held that no loss deduction is allowed. The adjusted tax basis of the demolished improvement is added to the tax basis of the new building, thus deferring the deduction over the depreciation term used for the new structure.

In any event, taxpayers can expect to be faced with a dispute on the question of intent when a substantial demolition loss is taken. Should litigation result on that issue, the taxpayer may, in view of the cited court decisions, be required to add the unrecovered tax basis of demolished improvements to the tax base of the new structure even though successful in establishing a lack of intent to demolish at the date of acquisition. Some immediate tax benefit will be obtained in either event if the lack of intention to demolish at acquisition has been established.

For these reasons, taxpayers purchasing real property should take the slight effort required to establish of record facts indicative of the intent with which real property has been acquired. The guideposts to intent set forth in the proposed regulations will be helpful in that regard whether or not the regulations become final.

3Appleby Est. 41 BTA 18 (NA), aff'd. 123 F. 2d 700; Phipps 5 TC 964 (NA).

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What's Doing AROUND THE COUNTY?

(The Bar Bulletin hopes to run this column each month. Affiliated Associations are invited to send items to the editor for printing.)

Beverly Hills Bar Association:

The Beverly Hills Bar social season concluded with a well-attended dinner dance on December 11th at the Beverly Hilton.

Two new committees have been established on a permanent basis, both arising out of previous work in conjunction with the University of California Extension Continuing Education of the Bar program. The first committee is the Committee on Labor Law, headed by Milton Tyre. This committee is sponsoring a labor law program in conjunction with the University of California Continuing Education Program in the Spring. The second committee is the Committee on Government Contracts, headed by Jack Paul. This committee is at present working on a program in conjunction with the Continuing Education Program, to be a sequel to the program sponsored last year.

San Gabriel Valley Bar Association:

The Lawyers' Reference Service of the San Gabriel Valley Bar Association, established last July, is now in full operation. Since the establishment of this service 166 references have been made.

Senator Richard Richards will speak to the January 8th meeting of the San Gabriel Valley Bar on the subject of recent legislative changes. The meeting will be at Rickey's Restaurant in Alhambra.

San Fernando Valley Bar Association:

The Juvenile Courts Committee of the San Fernando Valley Bar Association is studying the problem of attorney representation for juveniles detained for their own benefit. The decision as to whether to hire an attorney is often left to parents, who do not know what an attorney can do or are unwilling to pay for the services of an attorney. The Juvenile Courts Committee is studying a suggestion that the Juvenile Court be empowered to make an order for the payment of an attorney's fee by the parents upon application, as is done in divorce cases.

South Bay District Bar Association:

The South Bay District Bar Association became, on December 2, the 13th association affiliated with the Los Angeles Bar Association.

Los Angeles Bar Association:

The Los Angeles Bar held its annual Christmas Hi-Jinx December 11. The Jinx was a hilarious success.

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THE RIGHT TO INTEREST IN BANKRUPTCY . . . *By George M. Triester*

(Continued from page 78)

In terms of practical effect, however, the exceptions so often emasculate the rule that it seems almost misleading to approach the problem in the customary manner.

Because different factors may be involved, it is helpful to distinguish between secured obligations where the security arose by virtue of a voluntary agreement—e.g., trust deeds, real property and chattel mortgages, conditional sales contracts, pledges, and the like—and a statutory lien claim, which is in some ways a secured debt, but which is dependent for its existence solely on a legislative act rather than on the parties' bargain for collateral.[19] Interest on contracted for securities will be treated here; that on statutory liens will be considered below.

It is well established that where the security held by the creditor produces revenue after bankruptcy, he is entitled to apply the income to the payment of post-bankruptcy interest on his claim.[20] Such a situation can occur when, for example, a dividend paying stock has been pledged by the debtor, or rented real estate has been mortgaged. Recognition of this rule by courts in the United States simply involved a taking over of the similar English bankruptcy practice.[21] It finds justification in the fact that under the described circumstances, allowance of interest accruing during the period of delay in liquidating the estate will not operate to penalize the general creditors. On the contrary, to disallow post-petition interest here would permit the delay compelled by law to deprive the secured creditor of part of his bargain while giving a corresponding reward, or perhaps windfall, to other claimants who had no special rights in the security.

Much more important is the situation involving a security which is of sufficient value upon liquidation to satisfy both the principal of the debt and the interest accruing thereon to the date of actual payment. Although the Supreme Court has not as yet squarely decided the point, decisions of the lower federal courts hold that in such cases the secured creditor is entitled to post-bankruptcy interest out of the proceeds from the sale of the hypothecated property.[22] This means that, contrary to the general principle as it is usually stated, post-bankruptcy interest is payable on se-

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[19]Secured claims, generally speaking, are not affected by bankruptcy unless the transfer which created the security runs afoul of one or more of the trustee's avoiding powers under Sections 60 (preferences), 67d (fraudulent transfers), 70c (strong-arm clause) or 70e (power of creditors under state law). In cases where the security is invalidated, of course, the creditor has merely an unsecured claim in bankruptcy. The validly secured creditor is entitled to be paid in full from his collateral before general creditors may participate at all in the hypothecated property. Moreover, he need not even file a proof of claim in the proceeding, but can look instead to his security if he has possesion of it, or petition to reclaim it from the trustee if the latter has possession. *Clem v. Johnson*, 185 F.2d 1011 (C.A. 8, 1950); but see *United States Bank v. Chase Bank*, 331 U.S. 28, 33-34 (1947). The distinction between contractual security and a statutory lien is considered in the text, *infra*.

[20]*Sexton v. Dreyfus*, 219 U.S. 339 (1911).

[21]*Ex parte Ramsbottom*, 2 Mont. & A. 79 (1835); *Ex parte Penfold*, 4 De G. & Sm. 282 (1851); *Quartermaine's Case*, 1 Ch. 639 (1892).

[22]E.g. *In re Macomb Trailer Coach*, 200 F.2d 611 (C.A. 6, 1953); *Kagan v. Industrial Washing Machine Corp.*, 182 F.2d 139 (C.A. 1, 1950); *Palo Alto Mutual Savings and Loan Ass'n v. Williams*, 245 F.2d 77 (C.A. 9, 1957); see also 3 Collier on Bankruptcy, p. 1840.

cured debts whenever the creditor is actually fully secured. To the extent that the security is not sufficient to pay both principal and interest, the so-called secured creditor is really an unsecured one.

There is a theoretical justification for the general statement, however, which is pointed up in the case of a creditor who is only partially secured. Here the question arises as to whether he can apply the proceeds of his security first against accrued post-petition interest—thus leaving him with a larger unsatisfied claim owing as of the date of bankruptcy, which can be proved and participate in dividends as an unsecured debt — or whether he must first use the security to reduce the amount owing him at bankruptcy, which would result in leaving a non-allowable claim for post-petition interest. In *Sexton v. Dreyfus*,[23] the Supreme Court chose the latter of these two possibilities, thus giving a basis for the customary statement that interest generally ceases to accrue upon filing of the bankruptcy petition, both on secured and unsecured claims.

The foregoing rules and exceptions, which appear to be fairly clear, are made somewhat less reliable as guides because of another principle applied in at least one Supreme Court decision. *Vanston Committee v. Green*[24] concerned a secured bondholder whose security was sufficient to satisfy the principal of the obligation, all ordinary interest, together with additional contracted for interest which accrued during bankruptcy on the unpaid interest. The Court denied the claim insofar as it included the post-bankruptcy interest on unpaid interest, declaring that its allowability involved a weighing of "equities." The balance in *Vanston* was struck against the secured creditor because the delay in liquidating the security was law-imposed rather than voluntary. While the holding does not seem unreasonable, it cannot be predicted whether the decision is limited to its own facts, or whether the balancing process may be employed under other circumstances with unsettling effects.[25]

Tax Claims

At the present time, ordinary tax claims which are unsupported by a statutory lien are accorded the same interest treatment given other unsecured claims, being allowed interest up to the date of bankruptcy but not thereafter.[26] This, however, is a comparatively recent development. Under the original Bankruptcy Act of 1898, the debtor's delinquent taxes enjoyed a particularly favored status. The taxing agencies were not required to prove their claims; rather it was the trustee's duty to seek them out and to pay them in full ahead of the other creditors, including the priorities. The majority of the courts held that the unique position occupied by taxes further entitled them to interest until they were actually paid by the trustee,[27] and continued to so hold despite the fact that in 1926 the Act was amended to relegate taxes to the sixth level of priority.[28] The Chandler

[23]219 U.S. 339 (1911).

[24]329 U.S. 156 (1946).

[25]*Vanston* has had confusing effects. The decision was misread by the Ninth Circuit with the result that in *Beecher v. Leavenworth State Bank*, 192 F.2d 10 (C.A. 9, 1951), the court temporarily upset a previously well established principle.

[26]This statement refers to the amount of allowable interest. It must be kept in mind that the tax debts plus allowable interest are fourth priority claims upon distribution of the estate. Bankruptcy Act, Section 64a(4). That is to say, they (and the claims of higher priority status) are entitled to be paid in full before general unsecured creditors receive any dividend.

[27]The earliest decision establishing this rule was *In re Kallak*, 147 Fed. 276 (Dist. Ct., N.D., 1906).

[28]Representative of the majority view which prevailed until 1949 is *Davie v. Green*, 133 F.2d 451 (C.A. 1, 1943), decided after the Chandler Act of 1938.

amendments of 1938 raised this priority to the fourth rank, but significantly, for the first time required the taxing agencies to prove their claims in bankruptcy. Against the foregoing background, the Supreme Court, in 1949, declared the current rule prohibiting post-bankruptcy interest on taxes in *New York v. Saper.*[29]

Statutory Lien Claims

Statutory liens – common examples of which are the tax lien, the mechanic's and materialman's lien, and the various types of artisan's liens—are for certain purposes secured claims in bankruptcy. Except under those circumstances where Section 67c(2) of the Act invalidates them, they are entitled to full payment out of the liened property before that property becomes available to general creditors. Their right to post-bankruptcy interest in situations where the security is sufficient to pay it, however, is uncertain at the moment.

An authoritative answer to this question should be forthcoming in the near future, since the Government is now pressing several federal tax lien cases in the Courts of Appeal. It contends that in bankruptcy its lien is a secured obligation to the same extent as a mortgage or trust deed for almost all purposes, including the post-petition interest purpose.[30]

A statutory lien, however, is not in fact treated so favorably in bankruptcy as are contractually secured obligations. Unlike the latter, state-created statutory liens on personal property, with the possible exception of state tax liens, are void as against the trustee under Section 67c(2) unless the lienor has actually seized possession of the liened asset or levied on it prior to the filing of the petition.[31] Section 67c(1) of the Bankruptcy Act, moreover, while not invalidating federal statutory liens on personalty, postpones or subordinates them to the payment of the first two priority classes, i.e., expenses of administration and wage claims, except in the unusual case where the Government is in possession of the property at bankruptcy.

The significance of these provisions in the present context stems from the fact that the postponement feature of Section 67c(1) compels the trustee to delay payment of the subordinated liens in most cases for a considerable period of time. He cannot safely use funds to discharge them until it clearly appears that the estate is sufficient to take care of costs of administration and the priority wages which, as seen,

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[29]336 U.S. 328 (1949). The *Saper* case involved both state and federal taxes in a straight bankruptcy proceeding. Subsequently, its holding was applied to Chapter XI arrangements, *United States v. General Engineering & Mfg. Co.*, 188 F.2d 80 (C.A. 8, 1951), *aff'd* 342 U.S. 912; and to Chapter X corporate reorganizations, *United States v. Edens*, 189 F.2d 876 (C.A. 4, 1951), *aff'd* 342 U.S. 912.

[30]The Government argues that to disallow post-bankruptcy interest on its tax lien is to invalidate a portion of a valid secured claim, in effect relegating the statutory lien to a mere unsecured, fourth priority claim; and that nothing in the Bankruptcy Act authorizes such a step. Brief for the Appellant, pp. 31-32, 37-38, 51, *United States v. Bass*, now pending as case number 16348 in the Court of Appeals for the Ninth Circuit. The answer to this position is that the lien would not be invalidated. Only the amount of the debt for which the lien is security is in question. If, by virtue of the general rule against post-bankruptcy interest, tax claims cannot include such an interest factor, then the statutory lien may not secure more than is validly owing. In any event, even where subordinated by Section 67c(1) of the Act, tax lien claims are still senior to mere fourth priority taxes; rather than sharing prorata with the latter, they must be paid in full before non-lien taxes participate at all.

[31]The language of the statute would seem to indicate that all state-created, non-possessory statutory liens on personalty, including state tax liens, are nullified by Section 67c(2), unless a levy was made before bankruptcy. However, the Fifth Circuit has recently held that state tax liens are subject to postponement under Section 67c(1), but not to invalidation under Section 67c(2). *Rochelle v. City of Dallas*, 264 F.2d 166 (C.A. 5, 1959).

have seniority. On the other hand, since consensual collateral is not subject to the provisions of Section 67c, it does not ordinarily present a similar problem. If this kind of security is valid at all in bankruptcy, the trustee is free to liquidate it and to pay the creditor promptly. In view of the primary basis for the rule against post-bankruptcy interest—the thought that considerations of fairness prohibit the accrual of such interest at the expense of the general creditor body, when the administrative waiting period is required by law—it would seem that there does exist a valid distinction for present purposes between statutory liens and contracted for securities.

To date, seven federal district courts have dealt with this problem. All the cases involved the federal tax lien, although whatever rule is finally evolved should apply with equal force to other statutory liens as well. With one exception, the holdings were against the Government, disallowing interest after bankruptcy on tax claims, whether supported by liens or not.[32] In the remaining instance, the Director prevailed.[33] Because there are now pending in the Fourth, Ninth and Tenth Circuits, respectively, appeals taken by the Government in three of its losing cases, the matter

[32]*In re Lykens Hosiery Mills*, 141 F. Supp. 895 (S.D. N.Y., 1956); *In re Industrial Machine & Supply Co.*, 112 F. Supp. 261 (W.D. Pa., 1953); *In re Young*, 171 F. Supp. 317 (W. D. Wis., 1959); *In re Cameron*, 166 F. Supp. 400 (S.D. Cal., 1958); *Matter of G. N. Childress*, (M.D. N.C., 1958), Referee in Bankruptcy's opinion reported at 33 J. Nat'l Ass'n Ref. in Bankr. 12 (Jan. 1959), affirmed by the District Judge in an unreported order. Cf. *In re Mighell*, 168 F. Supp. 811 (D. Kan., 1958).

[33]*In re Parchem*, 166 F. Supp. 724 (D. Minn., 1958).

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remains a question mark until more authoritative decisions come down.[34]

Conclusion

The interest rules in force in bankruptcy proceedings can be summarized as follows: If interest bearing under applicable state law, the bankrupt's unsecured obligations should be allowed to include the interest which has accrued up to the date of the filing of the petition. This is clear in the case of debts founded upon judgments, notes or similar written instruments; though there is more room for argument, it is probably true also where other categories of provable debts are involved. Post-bankruptcy interest, however, normally is nonallowable on unsecured claims, whether they be general in nature or, like tax claims, entitled to priority treatment under the Bankruptcy Act.

Secured debts likewise are entitled to interest earned as of the time of bankruptcy. In addition, they draw interest up to the date of their actual payment by the trustee whenever the security is sufficient to pay the principal and interest in full, or when the collateral itself produces revenue during the period of administration. How a statutory lien—which lies somewhere between a secured and an unsecured debt in the eyes of the Bankruptcy Act—will be classified for post-bankruptcy interest purposes is not yet settled.[35] And in the rare situation involving a solvent bankrupt estate, every claim will be paid its principal amount together with all interest accrued to the date of payment, before the Court permits the trustee to return any surplus to the debtor.

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[34] The *Childress* case, *supra* n. 32, is presently pending in the Fourth Circuit, *sub nom. United States v. Harrington;* the *Cameron* case, *supra* n. 32, is presently pending in the Ninth Circuit, *sub nom. United States v. Bass;* and the Government has appealed the *Mighell* decision, *supra* n. 32, to the Tenth Circuit.

One leading authority, 2 Remington on Bankruptcy, pp. 224-225, has flatly asserted: "A governmental or public claim . . . cannot include interest accruing after the filing of the bankruptcy or reorganization petition, even though it has been reduced to lien form."

[35] Since the writing of this article, the Fourth and Ninth Circuits have furnished an answer to this question in the *Harrington* and *Bass* cases referred to in note 34 *supra. United States v. Harrington,* 269 F.2d 719 (C.A. 4, 1959); *United States v. Bass,* 271 F.2d 129, decided by the Ninth circuit on October 19, 1959. Both courts held that post-bankruptcy interest is not allowable on tax claims supported by statutory liens.

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Opinion No. 257

(February 20, 1959)

ADVERTISING – SOLICITATION. Employment of Same Attorney by Persons Having Similar Interests.

This Committee has been asked to express its opinion on a question arising from the factual situations described below under the headings of "Case No. 1" and "Case No. 2."

Case No. 1

The owners of separate parcels of real property within a certain large tract have incorporated a property owners association to oppose the efforts of the State, through an agency thereof, to acquire their properties within that tract. The president of the property owners association has sent a circular letter to the individual property owners. This letter states that a certain attorney, who is named, has advised the president that final purchase offers have been made, that a condemnation complaint will be filed within a given time, that the owners will be allowed a stated time to file their answers, and that it is highly desirable that arrangements with legal counsel be completed before the suit is filed. The letter also lists the names of individual owners who are represented by the named attorney. The letter then suggests that, if any other property owners are interested in engaging the named attorney, they should contact the president by phone or by returning the questionnaire enclosed with the letter. The reason for this suggestion is stated to be that it will be advantageous to work together both in terms of effectiveness and costs. The letter concludes with the statement that, as some owners have arranged for other attorneys, it will be presumed that the association can be of no further service to them. The questionnaire accompanying the letter has a space for the property owner's signature if he desires the named attorney to represent him and also contains a statement that the attorney's fee is based on a percentage of the increase in price over the State's highest previous offer.

Case No. 2

An individual has sent a circular letter to the owners of property within a certain area. The letter contains two enclosures: First, a document appointing a named attorney who is described as the attorney for a designated individual as agent to discuss with a public body the possibility of owner participation in the development of the area, and second, a document outlining a plan to organize a corporation which will participate in such development. The circular letter contains the statement that the "more property owners who stand behind Mr. .... (the attorney) in his negotiations, the stronger will be his position . . ." The circular letter is signed by an individual and carries a post office box address. It is written on stationery which does not have a let-

terhead. The individual who signed the letter is not the designated client of the attorney who is named in the letter and the first enclosure.

The question presented by the above factual situations is whether the attorneys involved have contravened the principles of ethical conduct.

Canon 27, Canons of Professional Ethics, American Bar Association, affirms that "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations." It also proscribes indirect advertisements for professional employment, as offending the traditions and lowering the tone of the professional. The California State Bar Rules of Professional Conduct also contain a prohibition that "A member of the State Bar shall not solicit professional employment by advertisement or otherwise." (Rule 2a).

Solicitation by the attorney in his name clearly violates the foregoing ethical standards. Thus, an attorney who is counsel for an association may not properly solicit employment from members of the association. *L. A. Bar Association Opinion No. 42.* Similarly, an attorney may not solicit employment by persons having claims under a Federal statute or by persons who have claims against a certain fund but who are unaware of that fact. *L. A. Bar Association Opinions Nos. 62 and 122.* Moreover, it is immaterial that the solicited individuals are in the same class as the attorney's client or have interests identical with or similar to those of the client. *A.B.A. Opinion No. 111.*

On the other hand, solicitation in the name of a third party may or may not constitute solicitation by the attorney. The Committee on Professional Ethics and Grievances, American Bar Association, gave some indication of its views in this regard in Opinion No. 111, referred to above. In that opinion, after condemning the direct solicitation by the attorney, it went on to say: "However, we see no valid ground to condemn the lawyer involved for accepting as clients such persons in a similar situation to that of his client, who may, without his active intervention, be persuaded by his clients to employ him." Our Committee has expressed a similar view. In Opinion No. 165, we took the position that an attorney may properly accept employment from injured persons who have been persuaded to employ him, either by clients injured in the same accident who had retained him or by an "interested citizen" who had not been involved in the accident. We also pointed out in that case that it must be clear that the attorney had nothing to do with the persuasion.

The limitation imposed in our Opinion No. 165—that the attorney must not participate in the solicitation—was considered at some length in our Opinion No. 151. That Opinion reached the conclusion that, in that case, there was no evidence of participation by the attorney. At the same time, it sets forth what this Committee would regard as such participation. Thus, the Committee said there would be participation by the attorney if in any degree he was one of the planners behind the Union's actions, or if there was a contract or understanding between the Union and the attorney, or if any consideration moved from the attorney to the Union.

The question raised by the factual situation now before this Committee is difficult to resolve. The letter in

Case No. 1 was signed by the president of the property owners association, while the letter in Case No. 2 was signed by an interested citizen. Thus, in both situations, the solicitation is in the names of persons other than the attorneys. In addition, even though it is obvious that the attorneys in both cases must have learned of the action shortly after it was taken, there is no evidence before the Committee that the attorneys in fact knew of the action before it was taken or that they participated in it in any way. On the other hand, since it is unlikely that such letters would be written without the knowledge or the consent of the attorneys, the probabilities would seem to be that the attorneys at least had knowledge of the action—even though they might not have consented explicitly to it. The fact that the attorney in Case No. 2 was appointed as agent would seem to be immaterial. The documents made it clear that he was an attorney and it must be assumed that he was appointed because of that fact.

In view of the foregoing, this Committee has reached two conclusions. First, if the attorney in either Case No. 1 or Case No. 2 initiated the action resulting in the letter, or if he participated in such action to any extent, we believe that such conduct on the part of the attorney offends Canon 27, American Bar Association, and Rule 2a, California State Bar Rules of Professional Conduct. Second, if the attorney in either of said cases did not initiate said action or did not participate in it to any extent, we believe that he is under no ethical duty to disclaim or disavow it and that he may with propriety accept employment resulting from the letter.

This Opinion, like all opinions of this Committee, is advisory only (By-Laws, Article X, Section 3).

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Brothers-in-law

By George Harnagel, Jr.

The presidency of Hugh W. (for Wallace) Darling is rapidly drawing to a close. It would be *ultra vires* for this department to review the accomplishments of his administration. It is traditional for a retiring chief executive to take care of that himself in his final President's Page. He may follow up with the observation that, although much has been accomplished, much remains to be done—which is becoming modesty on his part but might be construed as effrontery on ours.

It would also be *ultra vires* for us to inventory his professional attainments, his civic honors and his amiable qualities. To do so would trench upon the prerogatives of his successor, who usually discharges that duty in his first President's Page. To which *he* frequently appends the fervent hope that he can do as well as his predecessor. That, too, is becoming modesty on his part but might be construed as skepticism if it came from us.

Nevertheless we cannot restrain ourselves from laying one small sprig of laurel upon Mr. Darling's brow, or—to come down to earth—from saying one word of approbation. It relates to the President's Page as it has been carried on during his incumbency. And even here, to be sure that we are safely *intra vires,* we will not dwell on its thought-provoking content or its energetic style, but will zero in on one little known aspect of his monthly literary stint: He has always had his copy in on time.

The importance of that to the Bulletin Committee can only be appreciated by an editor who has everything in type and ready to go, but no President's Page – and sometimes no President within two thousand miles.

In some earlier years—so far back, of course, that we are referring to no living persons—and due unquestionably to reasons beyond anyone's control—the situation got so rugged for the Bulletin Committee on occasion that this Department was about to propose an amendment to the by-laws of the Association. It was simple, and would merely provide that no one would be eligible to run for the presidency of the Association unless and until he had first prepared and filed with the Bulletin Committee the copy for eleven President's Pages. (The twelfth one is written by the Chairman of the Junior Barristers, who, having to supply but one Page during the year, is usually no problem.) More recently, and particularly in the year

drawing to a close, such an amendment would have been quite unnecessary.

But we've retained a draft of it, just in case.

° ° °

The **Illinois** State Bar Association and the Illinois Department of Aeronautics have jointly produced a 16 mm., full color, sound motion picture, "New Dimension For Law." According to publicity released by the Association it is: "A pictorial account of milestones in the dramatic development of aviation law . . . from balloon days to the space age." Moreover, it "depicts [the] role of [the] lawyer in settling new problems of outer space."

° ° °

A Good Question

"There is of course the question of whether we are morally prepared to extend our activities to other worlds. As we look at the sad state of human affairs on our home planet we find much room for doubt whether or not other forms of life we may encounter in the Universe will benefit from their contact with man."—Dr. Wernher von Braun, former Director, U. S. Army Missile Command, Redstone, Ala., in *Texas Bar Journal.*

° ° °

This may be the place to report that the other day a fellow told us that he thinks all this talk about interplanetary travel is just a lot of monkey business.

° ° °

The following inscription appears over one of the entrances to the Lawyers Club of the University of Michigan:

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"The proper, industrious and intelligent conduct of a lawsuit requires an immense concentration, an unlimited effort. There is no excuse for second best work—a lawyer who regulates his effort by his fees is a traitor to his profession and his oath. This is . . . our distinction from tradesmen – a merchant may properly sell a second best article for a lesser price, but a lawyer must, whatever the fee, throw his whole abilities into any case, regardless of pay. He has no second best talents for sale. What he sells is his best, and must be paid for as such, by such as can pay."—From an address before the **Vancouver, B.C.** Bar Association by Mr. Justice Wilson of the Supreme Court of British Columbia.

* * *

"Assuming there is no such thing as a deliberately unfair judge (although there is some authority to the contrary), we are familiar with the situation where judges sometimes undergo personality changes while in office and become virtual tyrants." – From "When a Jury Trial?" by J. P. Nunnelly, past president of the California State Public Defender and Legal Aid Association in *Journal of the American Judicature Society.*

* * *

"Although my crystal ball reveals that the four-year law course is nearly upon us, I should point out that many of my colleagues in the teaching branch of the legal profession believe, at present at least, that we should refrain from significantly extending the present three-year program. They are concerned about the inevitable burden of increasing the length of time required for the law degree and for entry into law practice. So far as the immediate future is concerned, I agree with them. . . . But needs are changing and pressures are mounting. I am looking forward to a decade, hence, when a 'new look' at our professional life will assuredly call for a radical readjustment of our concept of the proper education for the bar. By then we shall be devoting four academic years to legal education." – E. Blythe Stason, Dean of the Law School of the University of Michigan in *Michigan State Bar Journal.*

* * *

How Jealous Can a Mistress Be?

"The lawyer does well from time to time to lift his eyes from his desk and look out the window on the wider world beyond. There can be a too sedulous devotion to the text books of the law and I do not commend the example of Chief Baron Palles who is said to have taken Fearne on Contingent Remainders with him for reading on his honeymoon."—Lord Macmillan in "Law and Letters."

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